APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-55611

MOTION PICTURE INDUSTRY PENSION & HEALTH PLANS,
Plaintiff-Appellee,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Defendant-Appellant.

November 1, 1999, Argued and Submitted,
Pasadena, California August 7, 2001, Filed

BEFORE: Harry Pregerson, John T. Noonan, and Diarmuid F. O'Scannlain, *Circuit Judges*.

OPINION

O'SCANNLAIN, *Circuit Judge*:

We must decide, in an action under the Employment Retirement Income Security Act ("ERISA"), whether trustees of employee benefit plans produced sufficient evidence of employer liability on summary judgment to shift the burden of production.

I

N.T. Audio, a corporation engaged in the business of creating optical sound negatives, employs approximately eighteen local union members. N.T. Audio is a party to collective bargaining agreements with the International Alliance of Theatrical State Employees and Motion Picture

Operators ("IATSE") and the Alliance of Motion Picture and Television Producers ("AMPTP"). Pursuant to these agreements, N.T. Audio was obligated to make contributions on behalf of its employees who were performing work covered under those agreements to two pension and employee benefits plans: (1) the Motion Picture Industry Health Plan and (2) the Motion Picture Industry Pension Plan (collectively, the "Plans"). The collective bargaining agreements also called for N.T. Audio to report to the Plans every hour worked by or guaranteed to their employees covered by those agreements.

The employer-union collective bargaining agreements provided remedies of liquidated damages and interest in the event of N.T. Audio's default in payment.

Furthermore, trustees of the Plans were authorized to audit the employment and payroll records of N.T. Audio to ensure that it complied with its contribution responsibilities.

In due course, trustees of the Plans initiated an audit of N.T. Audio's records, covering the period from January 1, 1989 through March 20, 1993. At the conclusion of the audit, in December 1995, they informed N.T. Audio that it owed the Plans approximately $32,000. N.T. Audio objected to the auditors' findings in a letter dated January 23, 1996.

On May 13, 1997, the Plans filed suit in the Central District of California under ERISA provisions 29 U.S.C. §§ 1132 and 1145, alleging that N.T. Audio had failed to pay the delinquent contributions identified in the audit. The Plans filed a motion for summary judgment on December 15, 1997, to which they attached a declaration of their chief auditor, Teri Goldstein, reciting that N.T. Audio had failed to keep adequate records and that the Plans' auditors had raised serious questions as to whether N.T. Audio employees had performed covered work for which contributions were not paid. Goldstein stated by declaration that "often, the absence

of detailed records made it impossible to determine the precise number of hours or type of work performed by [the employees]."

N.T. Audio filed its opposition to the motion for summary judgment on December 23, 1997, responding that the Plans' motion should fail because "they have not identified what work these individuals have done." On February 23, 1998, the district court entered judgment in favor of the Plans. N.T. Audio timely filed this appeal.[1]

II

Both sides agree that the controlling case on appeal is *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir. 1988). Brick Masons establishes that a trustee in an ERISA contribution case can make a showing that will shift the burden to the employer to come forward with evidence of the precise amount of covered work performed by its employees. *Id.* at 1337-40. The dispute between the Trustees and N.T. Audio is focused primarily on the quantum of the showing that the Trustees must make in order to effect such a shift in the burden of production.

---

[1] Before we were able to consider the merits of this appeal, we had to deal with the jurisdictional bar presented by *Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 981-84 (9th Cir. 1999) (holding that, because an ERISA plan is not a "participant, beneficiary,[or] fiduciary," subject matter jurisdiction did not exist under § 502(e) of ERISA over a suit brought by such a plan). Subsequent to oral argument, on April 10, 2000, we ordered the Plans to show cause why this appeal should not be dismissed for their failure to join their fiduciaries as necessary parties to this suit. In due course, on August 30, 2000, we granted the Plans' motion to join two members of their Board of Directors, Managing Director Hank Lachmund and Director Bruce C. Doering (collectively, the" Trustees"), as fiduciary plaintiffs in this suit. Once fiduciaries of the Plans were joined, jurisdiction was established pursuant to § 502(e) of ERISA, which grants exclusive jurisdiction to the district courts to hear" civil actions under this subchapter brought . . . by a participant, beneficiary, [or] fiduciary . . . ." 29 U.S.C. § 1132(e)(1).

In Brick Masons, union fringe benefit funds brought an action against an employer to recover contributions for certain masons employed by one of the employer's nonunion subsidiaries, who performed covered work for that same employer's unionized subsidiary. *Brick Masons*, 839 F.2d at 1336-37. There, the district court expressly found that while there was evidence that some covered work had been performed by the nonunion masons, there was no evidence of the extent of that work. *Id.* The district court concluded, therefore, that any damage award would be too speculative. *Id.*

On appeal, we reversed the district court and held that 29 U.S.C. § 1059(a)(1) of ERISA imposes a duty on employers to maintain records of the number of hours worked by employees. *Id.* at 1338. Consequently, we held that "once the trustees produce evidence raising genuine questions about the accuracy of the employer's records and the number of hours worked by the employees, the burden shifts to the employer to come forward with evidence of the precise amount of work performed." *Id.* at 1338. That is, "once the Trust Funds proved the fact of damage" and the employer's" failure to keep adequate records," the burden shifted to the employer to come forward with evidence of the "extent of the damage." *Id.* at 1338-39. The "fact of damage [was] certain" in Brick Masons because "it was undisputed that the Trust Funds received no contributions for work performed by [35 masons] even though they did some covered work during the relevant time period." *Id.* at 1338 (emphasis added). The only uncertainty was "in the amount of damages arising from the statutory violation by the employer." *Id.* at 1338 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946)). It was on this question that "the burden shifted to [the employer] to come forward with evidence of the extend of the covered work performed . . . ." 839 F.2d at 1338-39.

Thus, under Brick Masons, once the Trustees show 1) that N.T. Audio failed to keep adequate records, and 2) that there exist some employees who (a) performed covered work that was (b) unreported to the trust funds, then the burden shifts to the N.T. Audio to show the extent of the unreported covered work for those employees.[2]

There is little doubt that the Trustees met their first threshold burden, proving that N.T. Audio failed to keep adequate records. The Plans submitted in support of their motion for summary judgment declarations of the auditors who examined those records. Both auditors testified that N.T. Audio's records were insufficiently clear to determine precisely how

---

[2] The dissent complains that this formulation "raises the standard of proof required of the Plan Trustee." Dissent at 10230. It argues that while under Brick Masons "the Plan Trustee is merely required to 'raise genuine questions' about the accuracy of the employer's records and the number of hours worked," our "formulation requires the Plan Trustee to 'show' that he satisfied the elements of his burden." The dissent concludes (without explanation) that this increases the burden on the Plan Trustee because "it is more difficult to 'show' that something exists, than it is to 'raise a genuine question' whether something exists."

Whatever the merits of the dissent's contentions, Brick Masons itself demonstrates that this formulation is not a change at all. In Brick Masons, we explicitly held that the burden shifted when the trustees "proved" the facts of damage and the employer's failure to keep adequate records. 839 F.2d at 1338-39 (emphasis added). We also observed that" producing evidence raising genuine questions about the accuracy of the employer's records and the number of hours worked by the employees" would suffice to shift the burden. *Id.* at 1338 (emphasis added). These two statements are entirely consistent; indeed, evidence that "proves" the fact of damage and the employer's failure to keep adequate records necessarily "raises genuine questions" about the accuracy of the employer's records and the number of hours worked by employees. That we today describe the trustees' duty as requiring them to "show" the facts of damage and the employer's failure to keep adequate records is therefore entirely consistent with our precedent. *See* BLACK'S LAW DICTIONARY 1385 (7th ed. 1999) (defining "show" as "to make (facts, etc.) apparent or clear by evidence; to prove") (emphasis added).

many hours of covered work were performed by N.T. Audio's employees. Specifically, the Plans' senior auditor, Teri Goldstein, declared that she examined the available payroll records, timecards, and W-2s of all employees who had hours reported to the Plans during the audit period, and found some of them were compensated for more hours of work than had been reported. Goldstein further noted that while the documents occasionally revealed the nature of the services for which employees were being paid, they more frequently failed to identify the type of work performed. A second auditor, Steven Smith, confirmed these declarations, stating that he found N.T. Audio's records to be insufficiently detailed to allow him to identify the type of work performed. The affirmative declarations of the Plans' auditors are sufficient to meet the Trustees' first threshold burden.

Moreover, N.T. Audio effectively admitted the inadequacy of its own records when, in responding to a discovery request for all documents identifying the duties of employees, it responded that it "[did] not have such documents." If the records did, in fact, exist, N.T. Audio could simply have produced them, thereby refuting the Trustees' threshold showing. But it did not. This admission can "constitute a basis for summary judgment." *In re Pacific Express, Inc.*, 780 F.2d 1482, 1489 (9th Cir. 1986).

The Trustees did not, however, produce evidence meeting their other threshold burdens, proving that there existed some employees who (a) performed covered work that was (b) unreported to the Plans. Although the Trustees produced evidence to establish that N.T. Audio failed to report some of the hours worked by its employees, it did not produce evidence establishing that those unreported hours corresponded to covered work.

In previous cases, employee benefit plans have made the requisite showing that some of the unreported hours corresponded to covered work by submitting testimony by

employees who performed the unreported work. E.g., *Brick Masons*, 839 F.2d at 1340; *Combs v. King*, 764 F.2d 818, 820 (11th Cir. 1985). In this case, the Plans did not submit any employee testimony along with their motion for summary judgment, and, instead, offered only the testimony of their auditors. A close reading of this testimony, however, reveals that the Plans' auditors failed to show that any of the unreported hours corresponded to covered work.

There were two categories of unreported hours identified by the auditors. The first category was based on discrepancies between "payroll records, timecards, and W-2s "and the data reported by N.T. Audio to the Plans. Rather than establish that any of these discrepancies corresponded to covered work, however, the auditors appeared to presume without any basis that all of these hours were for covered work, concluding: "Since no documents were made available to explain the discrepancy, these additional hours for which pay was received were classified as underreported [covered] hours."

The second category was based on cash payments to employees unreported to the Plans. Again, rather than establish that any of these payments corresponded to covered work, the auditors appeared to presume without any basis that all of these hours were for covered work, concluding: "In the absence of such documentation, payments made to individuals who were known participants in the Plans were presumed to be for covered work."

Although it is true that each employee in question had performed some covered work for N.T. Audio, the auditors did not establish that any of the unreported hours corresponded to this covered work. As a result, the Trustees cannot prove "the fact of damage" that some of the unreported hours corresponded to covered work, and have,

therefore, failed to meet their threshold burdens.[3] Thus, it was inappropriate for the district court to grant summary judgment in favor of the Plans.

---

[3] Despite the Trustees' failure to meet their threshold burdens, the dissent would nonetheless affirm because, in its view," it is reasonable to infer . . . that the work performed by the employees was work covered by the collective bargaining agreement" (even though no proof of this was offered) because the Trustees demonstrated that (1)" the employees had a history of performing covered work for the defendant-employer," and (2) "some work performed by these employees was unreported to the plans." Dissent at 10231. The dissent, however, misapprehends the use of a burden-shifting approach in ERISA actions of this kind.

Burden-shifting alters the normal procedure—i.e., that a plaintiff must plead and prove its damages—and instead forces a defendant to disprove a plaintiff's claimed but unproven damages. This alteration is appropriate only where the fact of damage is itself certain, but the amount is uncertain because of an employer's substandard bookkeeping practices. *See Brick Masons*, 839 F.2d at 1338 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946)). In such cases, the normal rule is eschewed in favor of burden-shifting because "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Id.*

In contrast, the dissent's approach would allow trustees to sue an employer that keeps shoddy records—and, if the employer cannot disprove the trustees' alleged but unproven damages, to obtain a recovery—without proving that the employer's substandard bookkeeping caused the trustees any damage. Such a broad expansion of Brick Masons is not supported by the policy behind the use of burden-shifting in ERISA cases, and indeed, might raise constitutional concerns. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000) (explaining that to satisfy the standing requirements of Article III, a plaintiff must show, *inter alia*, that it has suffered "an 'injury in fact' that is . . . concrete and particularized and . . . not conjectural or hypothetical").

III

For the foregoing reasons, the district court's grant of summary judgment to the Plans, through, now, their Trustees, is

REVERSED and REMANDED.

PREGERSON, *Circuit Judge*, dissenting:

The majority today fashions a rule that imposes a difficult burden of production on the Plan Trustees and rewards employers who blatantly violate the record keeping duties imposed by ERISA. I respectfully dissent.

I.

The majority decision erodes the *Brick Masons* standard for shifting the burden of production in an ERISA contribution case where the employer has failed to keep adequate records, as required by ERISA. In *Brick Masons Pension Trust v. Indus. Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir. 1988), our circuit followed the Eleventh Circuit and adopted for ERISA cases the burden-shifting scheme established by the Supreme Court in the context of Fair Labor Standards Act cases. Under this scheme, "once the trustees produce evidence raising genuine questions about the accuracy of the employer's records and the number of hours worked by the employees, the burden shifts to the employer to come forward with evidence of the precise amount of work performed." *Brick Masons*, 839 F.2d at 1338 (citing *Combs v. King*, 764 F.2d 818, 822-27 (11th Cir. 1985)).

In *Brick Masons*, we adopted this burden shifting rule based on the legislative history of ERISA and public policy considerations. "Both the language and the legislative history of ERISA clearly require employers to keep records of their employees hours in order to permit the calculation of benefits due." 839 F.2d at 1338 (emphasis added). We stressed in Brick Masons the importance of the record keeping requirements of ERISA when we stated that the "records employers are required to keep by . . . ERISA may be the only evidence available to employees to prove that their employers have failed to compensate them in accordance with the statute." *Id.* Finally, we determined that the burden-shifting scheme was necessary to ensure that employers did not benefit from

their failure to maintain records. "An employer cannot escape liability for his failure to pay his employees the wages and benefits due to them under the law by hiding behind his failure to keep records as statutorily required." *Id.*

Under our holding in Brick Masons, a Plan Trustee meets the burden of production in an ERISA contribution case by producing evidence that: (1) raises genuine questions about the accuracy of the employer's records; and (2) raises genuine questions about the number of hours worked by the employees. *Id.* at 1337-38. In Brick Masons, we did not specifically address the question of who bears the burden of proving that the unreported work was covered by the collective bargaining agreement.

Faced with this question, the majority reformulates the Brick Masons burden shifting scheme. The majority's new formulation requires the Plan Trustee to "show that (1) the [defendant employer] failed to keep adequate records, and (2) that there exist some employees who (a) performed covered work that was (b) unreported to the trust funds. "Maj. Op. at 10225. The majority's new formulation increases the burden on the Plan Trustee by requiring the Plan Trustee to show that the unreported work is covered by the collective bargaining agreement. This added requirement contravenes the policy concerns on which we based our decision in Brick Masons. Additionally, the majority's new formulation raises the standard of proof required of the Plan Trustee. Under Brick Masons the Plan Trustee is merely required to" raise genuine questions" about the accuracy of the employers records and the number of hours worked. The majority's new formulation requires the Plan Trustee to "show" that he satisfied the elements of his burden. The new formulation increases the burden on the Plan Trustee because it is more difficult to "show" that something exists, than it is to "raise a genuine question" whether something exists.

The facts of this case illustrate the difference between the Brick Masons standard and the majority's new formulation. In this case, the Plan Trustees introduced evidence of an audit showing that the defendant employer, N.T. Audio, maintained incomplete records about the number of hours worked, and the work performed by its employees. As noted by the majority, N.T. Audio conceded the inadequacies of its records in its answers to interrogatories. Maj. Op. at 10226. The Plan Trustees also introduced evidence that N.T. Audio failed to report to the Plans work performed by employees who had previously performed covered work for N.T. Audio. Maj. Op. at 10226-27.

Under the majority's new formulation, the burden would not shift to the defendant, N.T. Audio, because the Plan Trustees did not show that the unreported hours were for work covered by the collective bargaining agreement. But under the Brick Masons standard, the Trustees would have satisfied their burden. In order to shift the burden of production to the employer under Brick Masons, the Trustees simply needed to raise genuine questions about the number of hours worked by the employees. As the majority concedes, the Trustees demonstrated that the employees had a history of performing covered work for the defendant-employer. And, as the majority further concedes, the Trustees demonstrated that some work performed by these employees was unreported to the Plans. It is reasonable to infer from these facts that the work performed by the employees was work covered by the collective bargaining agreement. Thus I would affirm the district court's determination that the Trustees raised genuine questions about the number of covered hours worked by the employees. *See Combs*, 764 F.2d at 827 ("The trustees met their burden when they produced affidavits of two of Mrs. King's employees and of the certified public accountant. These affidavits raised genuine questions about the accuracy of Mrs. King's records and the number of hours worked by her employees.") (emphasis added).

The majority's new formulation of the Plan Trustees' burden runs contrary to the policies identified in Brick Masons. The employer's records may be the only reliable evidence the Trustees can use to establish liability for contributions to the Plans. Under the majority's formulation, an employer stands to benefit from its failure to keep records as required by ERISA. *See* 29 U.S.C. § 1059(a)(1) ("every employer shall . . . maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees"); *Central States Pension Fund v. Cent. Transport, Inc.*, 472 U.S. 559, 573, 86 L. Ed. 2d 447, 105 S. Ct. 2833 (1985); ("[*ERISA*, 29 U.S.C. § 1059] requires employers to maintain records on employees and to furnish to benefit plans the information needed for the plans' fulfillment of their reporting duties."). The majority suggests that the Plan Trustees in this case could attach affidavits from the employees to establish that the unreported work was covered by the collective bargaining agreement. This assumes that employees will be able to remember in detail the number of the hours and type of work performed in the past.[1] If this assumption proves false, the Plan Trustees would not meet their burden under the majority's formulation, and the case would end without recourse.

In contrast, under Brick Masons, once the Plan Trustees meet their burden to raise genuine issues, the burden shifts to the employer to prove that the unreported hours were for covered work. The employer could meet its burden in various ways. Of course, if the employer maintained accurate and reliable records documenting the number of hours and the type of work performed by each employee as required by ERISA, such records should suffice to end the litigation. *See* 29 U.S.C. § 1059. If, as is true in this case, the employer fails

---

[1] This burden also assumes that employees will be willing to testify against their employers.

to abide by its statutory duty to maintain these records, the employer may still introduce other forms of evidence to meet its burden.

Michigan Laborers' Health Care Fund v. Grimaldi Concrete, Inc., 30 F.3d 692 (6th Cir. 1994) is the only circuit opinion to consider the question of who has the burden of producing evidence that work performed was work covered under the collective bargaining agreement. In Grimaldi Concrete, relying upon Brick Masons, the Sixth Circuit held that "an employer's failure to maintain adequate records shifts the burden to the employer to prove that the work performed was covered or not covered." *Id.* at 696. The employer in Grimaldi Concrete failed to keep records showing "which laborers performed covered work, or how many hours were spent performing covered work." *Id.* at 694. Because of this record deficiency, the trust fund "auditors were unable to determine the amount of work for which contributions were due." *Id.* The Sixth Circuit found that the employer's failure to maintain records shifted the burden to the employer" to prove what work was covered and what was not covered." *Id.* at 696.

In short, I would adhere to the burden shifting standard articulated by Brick Masons, and hold that a Plan Trustee satisfies its burden of production by showing that the employer kept inadequate records and by raising genuine questions as to whether employees have performed covered work for which contributions were not paid. Applying this standard to the instant case, I would find that the Plan Trustees satisfied their threshold burden and affirm the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Feb. 20, 1998]

CV-97-3617 R (RNBx)

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Plaintiffs,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Defendant.

JUDGMENT

This action came on for hearing before the Court, Honorable Manuel L. Real, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiffs, the Motion Picture Industry Pension and Health Plans, recover of the defendant, N.T. Audio Visual Supply, Inc., the sum of $70,673.34, with interest thereon at the rate provided by law, and the plaintiffs' costs of action.

Dated at Los Angeles, California, this 20th day of February, 1998.

MANUEL L. REAL
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Jan. 5, 1998]

CV-97-3617 R (RNBx)

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Plaintiffs,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Defendant.

JUDGMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This action came on for hearing before the Court, on January 5, 1998, Hon. Manuel L. Real presiding, on a Motion for Summary Judgment, or in the alternative, Summary Adjudication of Issues. The evidence presented by all parties having been duly considered, and all issues having been fully heard, and a decision having been rendered by this Court,

IT IS ORDERED AND ADJUDGED that judgment be found on behalf of plaintiffs the Motion Picture Industry Pension and Health Plans, in the amount of $46,385.84.

DATED: Jan. 5, 1998.

MANUEL L. REAL
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Jan. 5, 1998]

CV-97-3617 R (RNBx)

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Plaintiffs,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Defendant.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES [Local Rule 7.14.1]

The following Statement of Uncontroverted Facts and Conclusions of Law is presented pursuant to Local Rule 7.14.1 in support of the Motion for Summary Judgment, or in the alternative, Summary Adjudication of issues of plaintiffs Motion Picture Industry Pension and Health Plans ("the Plans").

UNCONTROVERTED FACTS

1. Plaintiff Plans are separate and individual Taft-Hartley funds as defined at Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c), and "fiduciaries" and "multi-employer plans" so defined in Sections 3(1)(A), (21)(A) and (37)(A) of the Employee Retire-

ment Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(1)(A), (21)(A) and (37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. §§ 1002(1)(A), (21)(A) and (37)(A). *See* Complaint for Damages and Injunctive Relief ("Complaint"), ¶ 5; Answer to Complaint for Damages and Injunctive Relief ("Answer to Complaint"), ¶ 1; FRCP Rule 8(d).

2. Plaintiffs are expressly named as third party beneficiaries in a series of collective bargaining agreements between the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada ("IATSE") and a multi-employer bargaining unit known as the Alliance of Motion Picture and Television Producers ("AMPTP"). *See* Basic Agreement of 1988, (attached as Exhibit "2" to the Declaration of Kevin P. Doran, hereinafter "Doran Decl."); and Basic Agreement of 1990, (Doran Decl., Exhibit "3") (collectively, "the Basic Agreement"), Arts. XII, XIII, XIIIA, XIV, and XXV, pp. 11-17, 31-32, and pp. 13-23, 42-44, respectively.

3. Defendant N.T. Audio Visual Supply, Inc. ('N.T. Audio") is a California corporation, and an employer within the meaning of Section 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2) and Section 3(5) of ERISA, 29 U.S.C. § 1002(5), and is engaged in commerce, in an industry affecting commerce, within the meaning of Sections 3(11) and (12) of ERISA, 29 U.S.C. §§ 1002(11) and (12). *See* Complaint, ¶ 7; Answer to Complaint, ¶ 1; FRCP Rule 8(d).

4. On or around November 16, 1987, defendant N.T. Audio signed an Agreement of Consent, binding it to the Basic Agreement negotiated between IATSE and AMPTP, and "any amendments, modifications, extensions, supplementations or renewals" thereof. (Doran Decl., ¶ 2; Exhibit "1").

5. Defendant N.T. Audio is also signatory to a Trust Acceptance form, binding it to the terms of the Motion

Picture Health and Welfare Fund Agreement and Declaration of Trust, the Motion Picture Industry Pension Plan, and the Motion Picture Industry Individual Account Plan (collectively, "the Declarations of Trust"). (Doran Decl., ¶ 5, Exhibit "10").

6. Defendant N.T. Audio admitted to being bound by the Basic Agreement, the subsidiary local agreements, and the Declarations of Trust. *See* Complaint, ¶ 7; Answer to Complaint, ¶ 1; FRCP Rule 8(d); (Declaration of Satoshi Yanai, ¶¶ 2 and 4, Exhibits "20" and "22").

7. During the audit period from January 1, 1989 to March 20, 1993, N.T. Audio was bound by the Basic Agreements of 1988 and 1990, and the Declarations of Trust. (Doran Decl., ¶¶ 3, 5).

8. Pursuant to provisions in the Basic Agreements of 1988 and 1990, defendant was also bound during the audit period to collective bargaining agreements negotiated on behalf of IATSE-affiliated local unions. (Doran Decl., ¶ 4).

9. These local collective bargaining agreements included the Local 683 Agreement of August 1, 1990; the Local 695 Agreements of August 1, 1988 and August 1, 1990; the Local 695C Agreements of August 1, 1988 and August 1, 1990; and the Local 776 Agreement of August 1, 1990. (Doran Decl., ¶ 4).

10. Pursuant to the provisions of the Basic Agreement, defendant N.T. Audio is required to make contribution payments to the Plans for every hour worked by or guaranteed to their employees covered under the terms of the Basic Agreement. (Doran Decl., ¶ 7; Exhibit "2", pp. 11-17, 31-32; Exhibit "3", pp. 13-23, 42-44).

11. Pursuant to the provisions of the Declarations of Trust, any default in payment of contributions subjects N.T. Audio to interest and liquidated damages, as well as the payment of

the delinquent contributions. (Doran Decl., ¶ 9; Exhibit "11", pp. 43-43e; Exhibit "12", pp. 3-3 to 3-5, Exhibit "13", pp. 3-2 to 3-3).

12. Pursuant to the provisions of the Declarations of Trust, N.T. Audio agreed to allow the Plans to audit its employment and payroll records that may be pertinent to its contribution obligations. (Doran Decl., ¶ 11; Exhibit "11", pp. 44; Exhibit "12", p. 3-5; Exhibit "13", p. 3-3).

13. Pursuant to the provisions of the Declarations of Trust, N.T. Audio agreed to be liable for all costs, including reasonable attorney's fees and court costs, incurred by the Plans to enforce collection of benefit contributions, interest, and liquidated damages. (Doran Decl., ¶ 10; Exhibit "11", pp. 43-43e; Exhibit "12", pp. 3-3 to 3-5; Exhibit "13", pp. 3-2 to 3-3).

14. In order to ensure defendant's compliance with its contribution obligations, a field audit of N.T. Audio's records was conducted during the period from July 14 to July 29, 1993. (Declaration of Teri Goldstein, hereinafter "Goldstein Decl.", ¶ 3; Declaration of Steven Smith, hereinafter "Smith Decl." ¶ 3).

15. Prior to said audit, defendant was notified of the records that were to be made available to the auditors so that a thorough audit could be conducted. (Doran Decl., ¶ 12, Exhibit "14").

16. The records of N.T. Audio were incomplete, and insufficient to determine the precise amount or type of work performed for all the employees of N.T. Audio. (Goldstein Decl., ¶ 4, 7, 9; Smith Decl., ¶ 7).

17. Discrepancies in defendant's records raised serious questions as to the accuracy of defendant's reports to the Plans. (Goldstein Decl., ¶ 4, 7, 10; Smith Decl., ¶ 6).

18. Based on the information available to them, the auditors reached the conclusion that contributions were owed on nineteen individuals, for a total of 6,383.1 delinquent hours. (Goldstein Decl., ¶¶ 6, 14, 17, Exhibit "B"; Smith Decl., ¶ 6).

19. By letters dated December 20 and December 21, 1995, defendant was informed that it owed total contributions, interest, and liquidated damages of $12,961.08 to the Motion Picture Industry Pension Plan, and $11,719.57 to the Motion Picture Industry Health Plan. An additional $7,695.00 was owed to cover audit costs. (Doran Decl., ¶ 13, Exhibits "15" and "16").

20. At the request of the Plans, defendant signed a tolling agreement on or about February 6, 1996. (Doran Decl., ¶ 14, Exhibit "17").

21. Under the terms of the tolling agreement, all statutes of limitation arising from the results of this audit would be tolled from December 21, 1995, until either party withdrew from the agreement pursuant to written notice. (Doran Decl., ¶ 14, Exhibit "17").

22. No written withdrawal from said tolling agreement by N.T. Audio has ever been received by the Plans. (Doran Decl., ¶ 15).

23. The complaint in this action was filed on May 13, 1997. *See* Complaint.

24. To date, defendant has not paid any of the delinquent contributions identified to it in the letters of December 20 and 21, 1995. (Doran Decl., ¶ 16).

25. Defendant has not raised evidence to establish that the individuals identified in the audit were not employees performing work covered under the terms of the Basic Agreement and the local agreements.

CONCLUSIONS OF LAW

1. By signing the Agreement of Consent, N.T. Audio became bound to abide by the terms of the Basic Agreements of 1988 and 1990. *Construction Teamsters Health and Welfare Trust v. Con Form Construction Corporation*, 657 F.2d 1101, 1103 (9th Cir. 1981).

2. By signing the Trust Acceptance, N.T. Audio became bound to abide by the terms of the Declarations of Trust. *Id.*

3. N.T. Audio is bound by its admission that it is bound to the Basic Agreement, the local agreements, and the Declarations of Trust. FRCP Rules 8(d), 36(a).

4. N.T. Audio is required to submit contributions to the Plans pursuant to any provisions in the Basic Agreement or Declarations of Trust that mandate such contributions. Section 515 of ERISA, 29 U.S.C. § 1145.

5. The Plans are entitled to examine employer records to determine an employer's compliance with its contribution obligations. *Santa Monica Culinary Welfare Fund v. Miramar Hotel Corporation*, 920 F.2d 1491, 1494-95 (9th Cir. 1990).

6. Compliance audits are not limited to those employees whom the employer identifies as being covered by the collective bargaining agreement. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 566-69; 105 S. Ct. 2833, 2838-39 (1985).

7. N.T. Audio is required to maintain employment and payroll records sufficient to allow the Plans to determine the accuracy of its contributions. Section 209 of ERISA, 29 U.S.C. § 1059; *Brick Masons Pension Trust v. Industrial Fence & Supply. Inc.*, 839 F.2d 1333, 1337-38 (9th Cir. 1988).

8. Since the inability of the Plans to determine the precise amount of contributions owing is due to N.T. Audio's failure

to maintain adequate records, the burden of establishing the precise amount and type of work performed is shifted to defendant. *Brick Masons*, 839 F.2d at 1338.

9. Since N.T. Audio cannot meet its burden of establishing the precise amount and type of work performed through competent evidence, the reasonable assumptions of the auditors are presumed correct. *Id.*, at 1339.

10. The Plans are entitled to liquidated damages, interest, and costs, including attorney's fees, for contribution delinquencies of defendant N.T. Audio. ERISA 1132(g)(2). *Operating Engineers Pension Trust v. B & E Backhoe, Inc.*, 911 F.2d 1347, 1355 (9th Cir. 1990) (attorney's fees); *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co.*, 746 F.2d 557, 569 (9th Cir. 1984) (liquidated damages); *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 514 (9th Cir. 1984) (attorney's fees and interest).

11. The Plans are the prevailing party for purposes of Section 502(g)(2) if *any* of the disputed contributions that are the subject of this suit are determined to be owed to the Plans. *B & E Backhoe*, 911 F.2d at 1355.

DATED: December 12, 1997

HOLGUIN & GARFIELD

By: /s/ Satoshi Yanai
SATOSHI YANAI

Attorneys for Plaintiffs the Motion Picture Industry Pension and Health Plans

MANUEL L. REAL

Jan. 5, 1998

U.S.D.J.

APPENDIX E

UNITED STATES CODE

---

29 USCS § 1059 (2001)

TITLE 29. LABOR

CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
PROTECTION OF EMPLOYEE BENEFIT RIGHTS
REGULATORY PROVISIONS
PARTICIPATION AND VESTING

§ 1059. Recordkeeping and reporting requirements

(a)(1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees. The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who—

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in section 203(b)(3)(A) [29 USCS § 1053(b)(3)(A)]).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be required under subparagraph (A) in any 12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph

shall be sufficient to inform the employee of his accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan.

(2) If more than one employer adopts a plan, each such employer shall, in accordance with regulations prescribed by the Secretary, furnish to the plan administrator the information necessary for the administrator to maintain the records and make the reports required by paragraph (1). Such administrator shall maintain the records and, to the extent provided under regulations prescribed by the Secretary, make the reports, required by paragraph (1).

(b) If any person who is required, under subsection (a), to furnish information or maintain records for any plan year fails to comply with such requirement, he shall pay to the Secretary a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.

HISTORY: (Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 2, § 209, 88 Stat. 865.)

UNITED STATES CODE

29 USCS § 1027 (2001)

TITLE 29. LABOR

CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
PROTECTION OF EMPLOYEE BENEFIT RIGHTS
REGULATORY PROVISIONS
REPORTING AND DISCLOSURE

§ 1027. Retention of records

Every person subject to a requirement to file any report or to certify any information therefor under this title or who would be subject to such a requirement but for an exemption or simplified reporting requirement under section 104(a)(2) or (3) of this title [29 USCS § 1024(a)(2) or (3)] shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain, or six years after the date on which such documents would have been filed but for an exemption or simplified reporting requirement under section 104(a)(2) or (3) [29 USCS § 1024(a)(2) or (3)].

HISTORY: (Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 107, 88 Stat. 850; Aug. 5, 1997, P.L. 105-34, Title XV, Subtitle A, § 1503(d)(5), 111 Stat. 1062.)